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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1039

ROBERT E. HOOPER,

Petitioner,

versus

CHRYSLER MOTORS CORPORATION,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALBERT SMITH
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Lubbock, Texas

Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES

Robert E. Hooper respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Cercuit, rendered in this casue on November 21, 1963. Motion for rehearing was overruled on January 9, 1964, and issued as mandate on January 22, 1964, affirming a judgment dismissing petitioner's claim against the respondent for damages with prejudice.

OPINIONS BELOW

The District Court did not render an opinion. It's judgment of dismissal with prejudice is copied in full in Appendix A. The opinion of the Court of Appeals for the Fifth Circuit is copied in full in Appendix B.

JURISDICTION

This matter involves the denial of the petitioner's right to a trial by jury in violation of the 7th amendment to the Constitution of the United States. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

THE QUESTION PRESENTED

(1) May a plaintiff be deprived of his Constitutional rights to a jury trial by a dismissal with prejudice when the uncontroverted and uncontradicted affidavits and evidence before the Court show that the plaintiff's presence is required at the hospital bedside of his twin sister?

(2) Which is more important: the settling of the parties' disputes by trial or the retirement of the cases from the docket as they are reached?

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law" Constitution of the United States, Amendment VII.

STATEMENT OF THE CASE

Petitioner Robert E. Hooper, a citizen of Texas, sued the respondent Chrysler Motors Corporation, a citizen of Delaware, to recover $197,767.40 damages resulting from the respondent's wrongful breach of a written contract.

The Trial Court overruled petitioner's motion for a continuance, alternative motion for a 14 day postponement, motion for a dismissal without prejudice, and dismissed petitioner's suit with prejudice. The Fifth Circuit affirmed.

Petitioner seeks a Writ of Certiorari to review the judgment and opinion affirming the Dismissal with Prejudice to the end that Petitioners' cause of action for damages may be reinstated and remanded to the District Court for trial on the merits.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has affirmed a judgment overruling the Petitioner's motion for a 14 day postponement, his Motion for a Dismissal Without Prejudice, and a Dismissal With Prejudice when the affidavits of the petitioner and the attending physician show that the petitioner could not attend a trial of this case on the date set; that petitioner's presence at the hospital bedside of his twin sister was "essential (and I use the term essential advisedly) to the well being of" petitioner's twin sister; and this action was taken by the Trial Court even though the affidavit of the petitioner and the attending physician was not controverted and there was no evidence of any kind or character to the contrary.

The Trial Court's action in dismissing petitioner's suit with prejudice was taken in the fact of the petitioner's request for a 14 day postponement to December 12, 1962, a date which was open to the Court. The action was arbitrary, was contrary to the uncontradicted and undisputed affidavits on file, and was a clean cut deprivation of the petitioner's right to a jury by trial as guaranteed by Amendment VII to the Constitution of the United States.

Petitioner's Motion for Postponement is attached as Appendix C. The affidavits of Petitioner and the attending physician are attached as Appendix D and E. No evidence was taken on the Motions. The colloquy between the Court and counsel is attached as Appendix F.

IMPORTANCE OF THE QUESTIONS PRESENTED

At the moment, there are no rules to guide a District Judge in acting on a Motion for Postponement or a Motion for Continuance. Litigants are relegated to the length of the "Chancellor's foot", and sometimes it is a pretty short foot.

This Court should write at least one rule in this case: When illness or the performance of surgery upon a party or a relative within the first degree prevents, in the sworn opinion of the attending physician, the attendance of a party at a trial of his case, a postponement shall be granted.

CONCLUSION

For the reasons stated, petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit that the judgment of that Court and the District Court may be reviewed and reversed, and this suit ordered reinstated and remanded to the District Court for trial on the merits.

Respectfully submitted,

ALBERT SMITH
909 Great Plains Life Building
Lubbock, Texas

BY: Albert Smith
counsel

CERTIFICATE

I, Albert Smith, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served upon the respondent a copy of the attached Petition for Certiorari with its Appendices, by depositing the same in the United States mails, postage prepaid at Lubbock, Texas, addressed to George W. McClesky, Central American Life Building, Lubbock, Texas, and David W. Kendall, P. O. Box 1919, Detroit 31, Michigan, this 7th day of April, 1964.

Albert Smith

ALBERT SMITH

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ROBERT E. HOOPER,
Plaintiff

vs.

CHRYSLER MOTORS CORPORATION,
Defendant

CIVIL ACTION
No. 2749

ORDER

On this the 28th day of November, A.D. 1962, the above entitled and numbered cause came on for trial during a regular term of this Court, and at the time set therefor, and the Plaintiff, acting through his attorney, having presented a Motion for Continuance which, in the opinion of the Court, did not present facts supporting and justifying the granting of such motion, and thereafter the plaintiff, acting through his attorney, having declined and refused to proceed to trial, which trial was ordered by the Court, and the Defendant appearing and announcing ready for trial, the Court is of the opinion that the Plaintiff has failed to comply with the order of this Court and is of the opinion that the facts in this case direct that the following order be entered upon motion of the Defendant, to-wit:

It is the finding of this Court that the facts set forth in Defendant's Motion for Dismissal with prejudice are true and correct and that, without sufficient ground to justify

his action the Plaintiff, acting through his attorney, has failed and refused to comply with the order of this Court that the trial of this case proceed, and that the facts herein support the following order:

IT IS THEREFORE ORDERED, ADJUDED AND DECREED that this cause be dismissed with prejudice to the bringing of another action concerning any of the matters involved herein, with costs taxed against the Plaintiff.

To which action of the Court the Plaintiff, in open Court, acting through his attorney of record, excepted.

ENTERED on this the 28 day of November, A.D. 1962.

UNITED STATES DISTRICT JUDGE

On this the 28th day of November, 1962, and prior to the entry of the above order, Plaintiff's counsel approves as true and correct the statement of factual development and procedure contained in Defendant's Motion to Dismiss with Prejudice, but this approval does not extend to the Defendant's suggestion, or the Court's finding, that Plaintiff defied the authority of the Court contained in the last paragraph preceding the prayer or the defendant's suggestion or the Court's finding that the plaintiff did not have good grounds for a Continuance.

Attorney of Record for Plaintiff

The pre-trial hearing of May 18, 1962, was conducted by Honorable Jos. B. Dooley. Let the record also reflect

that the November 26, 1962 trial date was the first setting of this case for trial.

Attorney of Record for Plaintiff

Attorney of Record for Defendant

APPENDIX B

"IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 20315
ROBERT E. HOOPER,
Appellant,
versus
CHRYSLER MOTORS CORPORATION,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, WISDOM AND BELL, Circuit Judges.

PER CURIAM: Appellant's case was dismissed with prejudice by the District Court when he declined to go to trial after denial of his motion for continuance. No abuse of discretion appears either with respect to the denial of the motion for continuance, or the dismissal. Rule 41(b), F.R. Civ. P.; Joseph v. Norton, 2 Cir. 1959, 273 F. 2d 65; and Girard Trust Co. v. Amsterdam, 5 Cir. 1942, 128 F. 2d 376.

It follows that the judgment appealed from must be, and is AFFIRMED."

APPENDIX C

"IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF TEXAS
LUBBOCK, DIVISION

ROBERT E. HOOPER, Plaintiff)
vs. CIVIL ACTION NO. 2749
CHRYSLER MOTORS CORPORATION Defendant)

PLAINTIFF'S FIRST MOTION FOR CONTINUANCE

TO THE HONORABLE SARAH T. HUGHES:

Comes now Robert E. Hooper, Plaintiff in the above styled and numbered cause, and makes this his first application for a continuance:

This is a first application for continuance. This continuance is not sought for delay only, but that justice may be done. The plaintiff's personal presence on the trial of this case is essential for the following, among other reasons:

This case involves the wrongful termination of a Direct Dealers Agreement by Chrysler Motors Corporation. The defendant contends that it was justified in terminating the contract because of certain claimed failures of the plaintiff to perform certain terms of the agreement. The plaintiff claims that he performed all of the terms of the agreement, and that the termination was wrongful and has caused the plaintiff certain named changes.

Although the plaintiff's deposition has been taken by the defendant, the defendant's contentions were not known at the time the deposition was taken and the plaintiff's version of the matters in controversy in this suit were not preserved at the time the deposition was taken for at least two reasons; namely, first, the plaintiff contemplated appearing in person and testifying on the trial of the case. Second, the defendant's contentions were not fully known at that time. For example, since the deposition was taken, the plaintiff has learned that the defendant claims that the plaintiff claimed to meet his minimum sales responsibility. The plaintiff says that if that be true, which is not admitted, nevertheless, the failure resulting from the defendant's refusal to furnish vehicles during the selling season. The plaintiff also understands that the defendant will contend that the plaintiff failed to devote sufficient time to the operation of the Bob Hooper Motor Co. This the plaintiff denies and this phase of the case, from the plaintiff's standpoint, was not developed upon the taking of the depositions.

Further, it is a well known fact that depositions are not given the weight and consideration by a jury that the testimony of a party or a witness receives when testifying from the witness chair in person.

Further, the illness of the plaintiff's sister, as set forth in the plaintiff's affidavit, and the affidavit of Dr. George H. Benzon, has made it impossible for the plaintiff to give his attorney the cooperation and assistance in the preparation of this case for trial which his attorney has requested. It will not be possible to do so for at least a week following November 26, 1962. The plaintiff's case, as a result, has not been, and is not now, properly prepared for trial.

On last Wednesday, November 21, 1962, in order to avoid inconvenience and expense to the defendant in bringing its out of town witnesses and counsel to Lubbock for a trial of this case on November 26, 1962, the plaintiff's attorney acquainted the defendant's local attorney, Mr. George McClesky, with the situation, and advised Mr. McClesky that the plaintiff could not be present for a trial of this case November 26, 1962. That afternoon counsel for the plaintiff, Albert Smith, and counsel for the defendant, George McClesky, called the Honorable Sarah T. Hughes by telephone at the Judge's office in Dallas, Texas and acquainted the Court with the situation. The plaintiff has done all that he could to avoid inconveniencing the Court and the Defendant, and its attorneys of record. Also, the plaintiff's attorney has personally talked to the attorneys involved in the two cases following this one on November 26, 1962, and has advised them that this Motion for a Continuance would be presented, and that the Plaintiff would not be in a position to go to trial.

WHEREFORE, Plaintiff prays that this case be continued for the term, and in the alternative, until such time as the Court and all parties can be ready for trial.

ALBERT SMITH
909 Great Plains Life Building
Lubbock, Texas

By: .....
of counsel

STATE OF TEXAS)

COUNTY OF LUBBOCK)

Before me, the undersigned authority, on this date personally appeared Robert E. Hooper, who being by me first duly sworn upon his oath stated that the representations set forth in the foregoing motion are true.

SUBSCRIBED AND SWORN to before me, on this November 1962.

Notary Public in and for Lubbock County, Texas

APPENDIX D

THE STATE OF TEXAS)

COUNTY OF HALE)

Before me, the undersigned authority, on this date personally appeared Dr. George H. Benzon, who being by me first duly sworn on his oath says:

My name is George H. Benzon. I am a medical doctor duly licensed to practice medicine in the State of Texas. My office is located in Plainview, Texas.

I have had Mrs. Ruth Tilson, twin sister of Robert E. Hooper under my care and treatment for about a year. Mrs. Tilson has a pre-malignant lesion which necessitates an abdominal hysterectomy on Monday, November 26, 1962 between 8:30 and 9:00 a.m. There is an apparently strong attachment between this twin brother and sister. Mrs. Tilson has requested the presence of her brother. I believe the presence of the Mr. Hooper is essential (and I

use the term essential advisedly) to the well being of Mrs. Tilson prior to, during, and for approximately one week following the contemplated surgery.

Mrs. Wilson has had a bleeding condition on at least six recent occasions. Preliminary tests and preparation have been made. In addition, she is in a highly nervous state. It is believed that a delay in the surgery would be detrimental to the procedure proposed and an optimum recovery.

SUBSCRIBED AND SWORN to before me by Dr. George H. Benzon on this November , 1962.

Notary Public in and for Hale County, Texas

APPENDIX E

STATE OF TEXAS)

COUNTY OF LUBBOCK)

Before me, the undersigned authority, on this date personally appeared Robert E. Hooper, who being by me first duly sworn on his oath says:

I am the plaintiff in cause No. 2749 styled Robert E. Hooper, plaintiff vs. Chrysler Motors Corporation, defendant in the United States District Court for the Northern District of Texas, Lubbock Division.

My twin sister, Mrs. Ruth Tilson, became acutely ill about a week ago. Her doctor advises surgery Monday morning, November 26, 1962, and an operation is scheduled at that time. Mrs. Tilson has requested that I be present, and that I stay with her until she is well out of

danger and the outcome is definitely determined. Our relationship is such that I believe my presence is necessary to her health and the success of the operation.

Further, my sister's condition has been such the past few days that I have not been able to give my attorney the time requested by him in the preparation of my case for trial. In other words, I have not been able to cooperate with my attorney in the preparation of this case for trial due to my twin sister's condition, and will not be able to do so for approximately one week following the surgery.

My sister's condition is such that it has not been deemed advisable to acquaint her with the setting of this case in your Court. We have not done so. In view of her condition, her request that I be with her at this time, and her doctor's opinion that my presence is necessary to her welfare, I feel that I must be there regardless of the consequences to my personal affairs.

SUBSCRIBED AND SWORN to before me on this November , 1962.

Notary Public in and for
Lubbock County, Texas "

APPENDIX F.

"Proceedings

The Court:

Robert E. Hooper versus Chrysler Motors Corporation, Number 2749–Civil.

Mr. Smith:

We have the Motion for Continuance which has been filed and I am under the impression should be on the Court's desk by now. That is a Motion for Continuance based upon matters with which I think the Court is already familiar.

The Court:

Mr. McClesky, what does the defendant have to say?

Mr. McClesky:

Your Honor, the Defendant is ready, and we have several people who are here from considerable distances and would like to go to trial.

The Court:

There is nothing in the Motion except what has already been presented to me, is that correct, Mr. Smith?

Mr. Smith:

We tried to give it all to the Court, yes.

The Court:

Do you have anything further to say Mr. McClesky?

Mr. McClesky:

I believe not, Your Honor.

The Court:

I'll overrule the Motion.

Mr. Smith:

Then, may we have an exception noted, if the Court please, to the ruling of the Court, and subject to the Motion for a Continuance, then I wish to present a Motion, which the Court has on its desk for a Dismissal Without Prejudice.

The Court:

What does the Defendant have to say about that?

Mr. McClesky:

Your Honor, it occurs to us that a dismissal without prejudice would accomplish indirectly that which has been denied on the direct Motion; namely, the Motion for Continuance, and we think that a Judgment should be entered.

The Court:

Well, I'll overrule the Motion to Dismiss.

Mr. Smith:

To which action we respectfully except, if the Court please.

The Court:

Is that all?

Mr. Smith:

That's all.

Mr. McClesky:

Your Honor, we have prepared such an Order in the case, as we have requested here—may I approach the Bench and have this passed to the Court?

The Court:

What sort of an order?

Mr. McClesky:

An Order recognizing that the grounds for continuance are inadequate and entering a judgment that the relief sought be denied.

The Court:

And what sort of relief?

Mr. McClesky:

A take nothing judgment, Your Honor.

The Court:

Well, I'm not going to enter that kind of an order at this time, but I will enter an Order overruling a Motion for Continuance. You have that.

Mr. McClesky:

May I make inquiry as to what action we should take in order to remain ready?

The Court:

Well, we're going to try it.

Mr. Smith:

If the Court please, we can't try it because Mr. Hooper is not here.

The Court:

Well, I will consider that in just a few minutes, if you will be seated at this time.

(At this point the Court finished calling the Docket.)

The Court:

All right, now come back up here, Mr. Smith and Mr. McClesky, to this first case, and if you will come around here and approach the Bench.

Now, I am perfectly willing to let this case come after the Taylor Case, if that will help you, Mr. Smith.

How long do you anticipate the Taylor Case will take, Mr. Gillespie?

Mr. Gillespie:

If the Court please, I anticipate it will take about two days.

Mr. Key:

—Your Honor, I believe that would be about right.

Mr. Smith:

If the Court please, I am advised by Mr. Hooper that he cannot be here this week, assuming that the operation went off up there at Plainview between 8:30 and 9 o'clock this morning, and I haven't checked to see about that, and I do want the Court to know that we appreciate that consideration, and it just might be that for the moment that that's the reasonable or the sensible thing to do, because I don't know whether that operation was done or not, and I won't know what Mr. Hooper's situation is until we hear from him.

The Court:

Well, now, I'm offering you the opportunity to go to trial after the Taylor Case. What do you want to do?

Mr. Smith:

Well, I should say that for the moment that we would stand on that and accept that offer of the Court and then if it doesn't turn out, we will have another Motion to present, subject to the action of the Court.

The Court:

All right, we will take then the Taylor Case first.

Time: 2 P.M. November 26, 1962 (Monday).

The Court:

Mr. Smith, are you ready now?

Mr. Smith:

The Plaintiff is not ready, if the Court please. I have talked to Dr. Benzon in Plainview since seeing the Court this morning, in fact, I talked to him after the lunch hour and he told me that the surgery on Mrs. Ruth Tillson had

gone forward this morning as contemplated and that the need for the presence of Mr. Hooper has not changed, as that need is set out in his affidavit of November 23, 1962. When the Court's Secretary called me, I had just finished dictating a supplemental affidavit for Dr. Benzon and a supplemental motion asking the Court for permission to take in effect what amounts to a non-suit in the State Court, but in Federal Court, it was a Motion for a Dismissal Without Prejudice, a supplemental Motion in that connection, setting out the developments that have occurred since the Court called the docket this morning at nine, and before you pass on our Motion to Dismiss Without Prejudice, I would like for that affidavit of Dr. Benzon to be available to the Court. It was set out in substance that the surgery was done as scheduled and that there has been no change in the need for the presence of Mr. Hooper there with his sister this week of November 26, 1962.

The Court:

You may reduce that to writing and have it signed as of this date.

Mr. Smith:

Thank you, Your Honor.

The Court:

Mr. McClesky, would you like to make any further statement?

Mr. McClesky:

Your Honor, we are just in the same position we were. Our witnesses are here, most of them are here.

The Court:

Would you like to state from where you brought them?

Mr. McClesky:

Yes, Your Honor, I would. I think it might be well for the record to show that on last Wednesday morning, which would have been November 21, 1962, Counsel for the Plaintiff, Mr. Smith, called me by phone and indicated that Mr. Hooper was wanting a postponement. He stated the grounds being that his sister was sick and probably it would be necessary to perform surgery and they anticipated performing that surgery on the morning of November 26. We considered the matter and being unable to quite understand this particular date, November 26, why it should be chosen for the surgery—apparently if it was safe to wait this long, we couldn't understand why it couldn't wait another few days. For that reason, we did not join in the Motion for Continuance, but rather we requested that the trial go forward.

With Counsel for the Plaintiff, a joint call was placed to the Court and that situation was explained, and it was indicated that probably that was not considered to be adequae grounds for continuance or postponement, in view of the nature of the operation, and the fact that the Plaintiff was not the one who was to be in the hospital or to be subjected to surgery.

We proceeded to get witnesses here from Atlanta, Georgia, from Chicago, Illinois, from Dallas, Texas, and also, the Co-Counsel and Mr. Keith Jenkins, an attorney of Chrysler Motors Corporation came here from Detroit, Michigan, and we are ready to go forward and think it desirable to do so.

For this reason, we continued to announce ready and request if we do not go forward with the trial of the case, that a take nothing Judgment be entered.

Mr. Smith:

If the Court please, I think the record ought to also

reflect that last week, either on Wednesday or possibly Friday morning, Counsel might want to correct me, but my recollection is that it was Wednesday afternoon of last week, that I told local Counsel for the Defendant that the Plaintiff had told me in substance that his sister's situation was very important to him and he felt that her wellbeing was more important than his own personal affairs, and that he could not be here this week, and I think that Counsel was adequately notified that Mr. Hooper simply could not be here.

The Court:

I think I would like to add to what is already in the record that I suggested the possibility of Judge Dooley trying this case during the week of December 10, because he was going to be in Lubbock on another case on December 12, and the Jury could have been held over for that purpose.

I think I should ask what was done with regard to my suggestion?

Mr. Smith:

That suggestion was discussed by Mr. McClesky and me, and it was agreeable to the Plaintiff to do that. In other words, it was agreeable with the Plaintiff to put the case over until December 10 or 12th, as suggested by Judge Hughes, but due to a previous setting of the Defendant's Counsel of December 12, I believe it was, that was not agreeable.

Now, I have that right, don't I, George? I was agreeable in behalf of the Plaintiff to set this case over until December 12, but you had a preferential setting in some other Court and for that matter, I would say, that putting it in that light—I don't wish to cast any reflections whatever:

Mr. McClesky:

If the Court please, for the purpose of the record, I had understood that Counsel for the Plaintiff had five settings for that same week in one or more other Courts, and at the same time he indicated to me that he had those settings. I advised him of the preferential setting that I have had for some time on an injunction suit involving the polution of underground water, set in the State District Court at Littlefield, Texas, and I think by reason of the fact that we both had conflicts, was my recollection, Mr. Smith, that we more or less dropped the discussion of that week.

Mr. Smith:

I regret that I don't have the same recollection, because if you will recall, I told you I could manage my situation. That is true that I had five cases set for that week in December; four of them are in one Court and one in another, I forget which, but I do believe that all five of them are here in Lubbock, and the Judges are rather Cooperative on conflicting settings all over this country. I have one time yet—well, I have never heard that ever requested where there was a conflicting case, and they were not cooperative, and I believe that reflects the situation on that.

The Court:

Well, it's my opinion that since the Plaintiff could be with his sister after Court in the afternoon and before Court in the morning, and the operation having been had, that there is no reason for a further continuance, and therefore, I overrule your Motion to Continue and likewise overrule the Motion to Dismiss.

Mr. Smith:

If the Court please, let the record reflect then, and I'm not certain that it is necessary, that an exception is necessary, but in any event, let me in behalf of the Plaintiff object to the Court's ruling and take the formal exception to the ruling of the Court in Overruling the Motion for Continuance, and also in Overruling the Motion for Dismissal Without Prejudice.

The Court:

Are you ready then, to proceed at this time?

Mr. Smith:

No,m 'am. I can't proceed. Mr. Hooper is in Plainview and due to his sister's condition, at least that's what he tells me and I have no reason to doubt it, he hasn't been able to give me the cooperation in preparation that I needed in the first place, and he's not even in town. I talked to him in Plainview less than 45 minutes ago, and I'm not in a position to proceed to the trial of this case. It would be nothingness.

Mr. McClesky:

Your Honor, under those circumstances then, we would request a take nothing Judgment be entered and we would prepare such Judgment in order that we might enter it.

The Court:

I will sustain a Motion to Dismiss with Prejudice rather than a take nothing Judgment. I don't know that there's any difference, but at least it's worded a little differently.

Mr. McClesky:

We shall prepare such a Motion and an Order and present it to the Court.

Mr. Smith:

And will the Court again note our exception?

The Court:

Yes, and I will ask that it be included in there.

Mr. McClesky:

We shall include it."

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JOHN C. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1139

ROBERT E. HOOPER,
Petitioner,

vs.

CHRYSLER MOTORS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1039

ROBERT E. HOOPER,
Petitioner,

vs

CHRYSLER MOTORS CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Respondent, CHRYSLER MOTORS CORPORATION, respectfully prays that the Petition for Certiorari be denied, and in support of this position, presents the following:

OPINIONS BELOW

The opinion rendered by the United States Court of Appeals for the Fifth Circuit is printed at 325 F.2d 321. The Trial Court's disposition of this case was a dismissal with prejudice, printed at p. 19 of the Printed Record in the Fifth Circuit.

QUESTION PRESENTED

Contrary to Petitioner's statement as to the question presented, the only question present in this case is:

Did the District Court abuse its discretion in any of the following actions?

(a) In overruling Petitioner's Motion for Continuance or postponement;

(b) In overruling Petitioner's Motion for Dismissal without prejudice;

(c) In granting Respondent's Motion for Dismissal with Prejudice after Petitioner's refusal to proceed to trial as directed by the Court.

FEDERAL RULES INVOLVED

The opinion of the District Court and the United States Court of Appeals for the Fifth Circuit was based upon Rule 41(b), Federal Rules of Civil Procedure. The pertinent part of this rule is as follows:

"(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against

him. . . . Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete. The Petitioner has omitted some dates and signatures from the instruments printed as Appendices to his Petition. In addition, while Petitioner sets out as Appendices several Motions made by Petitioner and orders relating to these motions, Petitioner has omitted several pertinent documents, including Respondent's Motion to Dismiss with Prejudice. This Motion appears beginning at page 15 of the Printed Record in the Fifth Circuit. The other omitted documents, dates, and signatures also may be found in the Printed Record. Respondent submits the following facts as controlling upon the question here involved:

1. To the date of dismissal with prejudice on November 26, 1962, this case had been on file for more than fourteen (14) months, it having been instituted by the filing of Petitioner's Original Complaint on September 20, 1961. (Motion to Dismiss with Prejudice, Printed Record, p. 15).

2. The parties hereto anticipated a trial of this case during the May, 1962, term of Court and to that end, a pre-trial hearing was conducted on May 18, 1962. (Motion to Dismiss with Prejudice, Printed Record, p. 16).

3. In order to permit Petitioner additional time for preparation, trial of this case was passed from the May, 1962, term over to the November, 1962, term. (Motion to

Dismiss with Prejudice, Printed Record, p. 16; stipulated as correct at close of Order Dismissing with Prejudice, Printed Record, p. 20).

4. The record is silent as to any claim that there was inadequate time or opportunity for preparation except for the contention that "for the past few days" immediately preceding November 23, 1962, Petitioner was not able to give his attorney the time "requested by him" in the preparation of the case for trial. (Plaintiff's First Motion for Continuance, Printed Record, p. 9).

5. On May 18, 1962, Petitioner was on notice that this case would be tried during the November, 1962, term and on November 1, 1962, the case was set for trial as Case No. 1 for 9:00 a.m., Monday, November 26, 1962. (Motion to Dismiss with Prejudice, Printed Record, p. 16).

6. Petitioner knew of his sister's pending hysterectomy operation at least five (5) days prior to the trial date, but he does not allege that any effort was made to change the date of the operation and thus avoid for him a conflict between the date of the operation and the trial date. (Plaintiff's First Motion for Continuance, Printed Record, p. 6).

7. Petitioner knew at least five (5) days prior to trial date that the reason he advanced in seeking a continuance was insufficient. (Motion to Dismiss with Prejudice, Printed Record, p. 16; stipulated as correct by Petitioner, Printed Record, p. 20; Transcript of Proceedings, Printed Record, p. 30).

8. The place of the trial is only about forty-eight (48) miles distant from the hospital where Petitioner's sister underwent surgery. (Motion to Dismiss with Prejudice, Printed Record, pp. 16, 17). Petitioner could have

been with his hospitalized sister before court in the morning and after court in the afternoon. (Transcript of Proceedings, Printed Record, p. 32).

9. On Monday, November 26, 1962, this case was called for trial. Because of Petitioner's absence, however, the Trial Judge ordered a second case to trial. After noon on the same date, the other case was completed and this case was again called for trial. By this time, the operation had been completed and no complications had arisen. Petitioner still declined to proceed with the trial and again refused to go to trial at any time during that week. (Transcript of Proceedings, Printed Record, pp. 27-29).

10. Petitioner refused to proceed to trial for reasons that the Trial Court declared to be inadequate (Transcript of Proceedings, Printed Record, p. 32; Order, Printed Record, p. 19). Petitioner thereby failed to comply with the order of the Trial Court (Order, Printed Record, p. 19).

11. Petitioner refused to proceed to trial at any time during the week beginning November 26, 1962 (Motion to Dismiss with Prejudice, Printed Record, p. 17; Transcript of Proceedings, Printed Record, p. 27).

12. On November 21, 1962, both counsel discussed a postponement to December 12, 1962, but consideration of this date was discontinued because of conflicting settings previously made for both Petitioner's and Respondent's attorneys. Postponement of the trial of this case to December 12, 1962, was not agreeable to Petitioner until November 26, 1962, but by that time Respondent had brought to Lubbock, Texas, for trial co-counsel and witnesses from Chicago, Illinois, Detroit, Michigan, Atlanta, Georgia, and Dallas, Texas (Transcript of Proceedings, Printed Record, pp. 30, 31).

ARGUMENT

The Petitioner asserts that he has been unconstitutionally deprived of a jury trial. An examination of the proceedings below shows that Petitioner did not raise this constitutional question until his Motion for Rehearing before the United States Court of Appeals for the Fifth Circuit. Prior to that time, his sole contention was that the Trial Court had abused its discretion in overruling Petitioner's Motion for Continuance and granting the respondent's Motion for Dismissal with Prejudice.

Petitioner's contention before this court that he has been deprived of a jury trial is misleading and inaccurate. The Petitioner not only was offered a jury trial, but in fact, was ordered to proceed with a jury trial. Petitioner deliberately refused to obey this order of the Trial Judge. The question before this Court is whether or not the trial court abused its discretion in ruling that Petitioner "without sufficient grounds to justify his action . . . failed and refused to comply with the order of this court that the trial of this case proceed." (Order, Printed Record, p. 19).

No party is entitled to a continuance as a matter of right, but the trial court has discretion to grant or deny a Motion for Continuance. *Jameson* v. *DuComb*, 275 F.2d 293, 7th Cir., 1960. Rule 41(b), Federal Rules of Civil Procedure, expressly provides that the trial court may in its discretion dismiss a case with prejudice if the Petitioner fails to obey an order of the court. *Link* v. *Wabash Railroad Company*, 270 U.S. 626; 8 L. Ed. 2d 734; 82 S. Ct. 1386 (1962).

The Petitioner argues that he was justified in refusing to proceed to trial because he personally was unable to be present for trial and therefore was entitled to a continuance. Petitioner's "inability" to be present for trial was not the result of his illness or of the illness of any member of his immediate family, but was caused by the Petitioner's desire to be with his sister after she had surgery, consisting of a hysterectomy, which involved no complications.

On the trial date, another case on the docket was first put to trial in order to afford Petitioner additional opportunity to reconsider his previous refusal to proceed to trial as ordered by the Court. After noon on the same date, trial of the other case was completed and again Petitioner's counsel, knowing the surgery to have been completed and there being no complications as a result of the operation, still declined to proceed with the trial and refused to go to trial at any time later in the week.

This operation was not an emergency. The doctor's affidavit indicated that he had been treating Mrs. Tilson for about a year. The date for the hysterectomy was set at least five (5) days prior to the operation to coincide with the exact time at which Petitioner's case was set for trial. While Petitioner's affidavit states that his sister became acutely ill a week prior to the 21st of November, the doctor's affidavit nowhere states that the sister was in any actual physical danger. A hysterectomy is not ordinarily a dangerous operation. Several questions arise: Why was it essential to wait at least five (5) days before proceeding with the operation? If the operation could be postponed for five (5) days, why could not the operation be postponed for seven (7) or eight (8) days until the trial was completed? To say the least, the selection of this exact time and date for the operation was peculiar.

and this fact in itself is sufficient to support the position that Petitioner's action was capricious and such as to defy the authority and orderly conduct of business of the court. As was said in *Cunningham* v. *United States*, 295 F.2d 535 (9th Cir., 1961, Dismissal with Prejudice approved):

> "The trial court was entitled to regard the affidavits of the parties plaintiff as implausible or as not actually reaching the crucial point of why the plaintiffs did not show up at the time appointed for the trial * * *." P. 536.

As pointed out by Judge Hughes in the present case, Petitioner would be with his sister every morning and evening after the trial had recessed. By the time that Petitioner finally refused to go to trial, the operation had been performed. No complications were described in the doctor's supplemental affidavit. This would indicate that the operation was "routine."

Perhaps a more flagrant indication of Petitioner's defiant action is found in his assertions to the trial court that not only was he unavailable for the trial on the date of the operation, but that he would also be unavailable at any time during the week following the operation. Under these circumstances, the trial court certainly did not abuse its discretion in denying Petitioner's Motion for Continuance.

Once the Motion for Continuance was denied and Petitioner refused to proceed to trial, the court was confronted with taking further action to enforce its order with respect to the requested continuance. If Petitioner's Motion for Dismissal without Prejudice had been granted, Petitioner could have then refiled his suit and he would have obtained his continuance. The court had no alternative but to dismiss the Petitioner's case with prejudice

in order to enforce its order denying the Petitioner's Motion for Continuance.

In addition, Rule 41(b), Federal Rules of Civil Procedure, authorizes involuntary dismissal for failure to comply with an order of the court. Here the trial court ordered that the case should proceed to trial. Petitioner refused and declined to comply. He was not physically, mentally or financially unable to proceed, but he deliberately chose to substitute his decision and judgment for that of a United States District Court. This type of capricious and defiant action, if permitted or encouraged, would thwart orderly judicial procedure and make a mockery of our courts.

The Petitioner requests that this Court establish a rule that the trial court shall be required to grant a continuance whenever in the sworn opinion of the attending physician illness or an operation to a party or a relative within the first degree "prevents" the party's attendance at the trial. The mere statement of this "rule" points out that this "rule" would remove an area of discretion from the trial judge and place the control of trial dates in the hands of a physician. The physician's action would not be subject to cross-examination and would not be reviewable by any court for abuse of discretion. The facts in the present case show the dangers of such a "rule". The Petitioner wishes to substitute his opinion for that of the trial judge as to whether or not he could be present at the trial. If every party could dictate to the trial court when and where he would be present for the trial as Petitioner desires to do, a trial judge would no longer have control of the docket. Such an interfegence with normal court proceedings cannot be allowed.

Petitioner's petition for a writ of certiorari is devoid of any questions of public importance warranting review

by this court. Petitioner's failure to obtain a trial was due only to his capricious refusal to proceed at the time this case was set for trial before a jury.

CONCLUSION

It is respectfully submitted that the trial court, far from abusing its discretion, disposed of this case in the only proper manner and therefore, the Respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Of Respondent's Counsel

CERTIFICATE

Prior to the filing of this brief in this Court, a copy hereof has been mailed to Albert Smith, 909 Great Plains Life Building, Lubbock, Texas, Attorney for Appellant.

Of Respondent's Counsel